

87-1675
No.

Supreme Court, U.S.

FILED

APR 11 1988

JOSEPH F. SPANIOL, JR.

In The
Supreme Court of the United States

October Term, 1987

ANTHONY J. SCHERER JR.,

Petitioner,

v.

DAVID J. BALKEMA, et al.

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE
SEVENTH CIRCUIT**

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QUESTIONS PRESENTED

1. Whether or not the doctrine of collateral estoppel applies in this lawsuit when:
 - a) It was not ruled upon by the District Court?, and
 - b) The standard of proof in the prior cases was higher than in this case and thus could be met now?, and
 - c) The prior cases specifically hold that its ruling is because of the standard of proof?
2. Whether or not the Complaint alleges exhaustion of remedies under FOIA?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit will be published at ___ F.2d ___ (Feb. 9, 1988, No. 87-1240), and is printed as an Appendix to this Petition, Appendix A.

JURISDICTION

The Order of the Court of Appeals was entered on February 9, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

All Writs Act, 28 U.S.C. § 1651

- a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
- b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

STATEMENT OF THE CASE

This case involves allegations that governmental agents, mostly agents of the United States Department of the Treasury's Bureau of Alcohol, Tobacco and Firearms (BATF), conspired "to deprive Petitioner of his constitutional rights by engaging in a pattern of attempted entrapment, illegal searches and seizures, perjury, the destruction of evidence, and the withholding of documents." (Appendix A, p. 2). The District Court dismissed the entire lawsuit holding that the amended complaint failed to state a cause of action and the statute of limitations barred most of the allegations, and that the rest of the allegations failed to sufficiently allege a conspiracy to deprive him of his constitutional rights.

The Court of Appeals did not decide whether or not the complaint stated a cause of action. It ruled that the District Court erred when it held that the statute of limitations had run, but Affirmed the dismissal of the complaint based on the doctrine of collateral estoppel, a ground not ruled upon by the District Court.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision holds that the District Court was wrong but still upholds the ultimate decision dismissing the Complaint. The District Court never ruled on the issue relied upon by the Court of Appeals. Fundamental fairness requires the granting of the Writ so that

the Court can see that it needed a more complete record to decide the issue it based its Affirmance upon. A complete record will show that Court's decision to be factually and legally incorrect.

ARGUMENT

The Seventh Circuit ruled that prior lawsuits and decisions preclude, by the doctrine of collateral estoppel, Scherer's timely claims. The District Court did not rule on this issue.

The Seventh Circuit looked to two (2) other lawsuits to reach its decision. In the first *U.S. v. Scherer*, No. 79-1342 (7th Cir.), (Unpublished Order, May 21, 1980), *Cert. Denied*, 449 U.S. 873 (1980) (Appendix C), in Scherer's attempt to reverse his criminal conviction, under 28 U.S.C. § 2255, the Court ruled that the record "precludes considerations of his claim . . ." and that "nor has the Defendant met his burden of alleging and showing specific, actual prejudice and conflict of interest. This burden is particularly heavy . . ."

In the second lawsuit used to apply collateral estoppel, *United States v. Scherer*, 673 F.2d 176 (7th Cir. 1982), Scherer sought to overturn his conviction via a petition for a writ of error *coram nobis*. The Court noted that the writ "will not lie for every error discovered after judgment. It is an extraordinary remedy . . . for errors of fact . . . Where the errors [are] of the most fundamental character, that is, such as render the proceeding itself irregular and invalid . . . the burden is on the petitioner, to demonstrate . . . a complete miscarriage of justice . . . that due diligence could not have revealed the evidence prior to trial . . . that, if known at trial, it would have allowed the defendant to present his case in a manner which would have likely led to a different result." *Scherer*, *supra*, 673 F.2d at 178.

The Seventh Circuit only found that newly discovered evidence "brings no new significant facts to this case and does not warrant *coram nobis* relief" and that it "does not lead to the conclusion that Scherer's trial was so fundamentally flawed as to constitute a miscarriage of justice." *Scherer*, *supra*, 673 F.2d at 179. Other documents relied upon by Scherer also failed to convince the Court that "his conviction amounted to a complete miscarriage of justice." *Scherer*, *supra*, 673 F.2d at 188.

In all the prior cases the Courts required Scherer to prove, not merely allege, a complete miscarriage of justice or actual prejudice. In a civil rights complaint, which is the underlying issue in this appeal, Scherer must, upon a motion to dismiss which is the procedure relied upon by defendants, only allege that his civil rights were violated.

The complaint is taken as true and need not allege a miscarriage of justice or show that a different result in the criminal trial was likely. As in every other civil case, Plaintiff must merely prove his allegation by a preponderance of the evidence.

Scherer no longer must meet that heavy burden nor is it presumed the criminal proceedings were correct. The fact that Scherer could not meet the extraordinarily high burden of proof for *coram nobis* relief or for a writ of habeas corpus does not lead to the legal conclusion that he should not be given his day in court to prove that he can meet the normal burdens that all Plaintiffs in a civil lawsuit must meet. As this Court recently held, "It is clear that the difference in the relative burdens of proof in the . . . actions precludes that application of the doctrine of collateral estoppel." *United States v. One Assortment of 89 Firearms*, 104 S.Ct. 1099, 1104, 465 U.S. 354, 360, 79 L.Ed.2d 361 (1984). The Seventh Circuit ignores this fundamental statement of law.

The last part of the Court's opinion herein held that the other timely allegations concerning FOIA do not allege

that FOIA remedies were exhausted nor does this allegation identify a violation of constitutional rights. Scherer did allege that his FOIA remedies were exhausted and these acts did violate his constitutional rights. (Amended Complaint, App. B., see No. 158-168, especially No. 166).

The decision by the Court of Appeals denies litigants their day in Court. It confuses burdens of proof and equated higher burdens with lesser ones. The amended complaint was timely, specific and not barred by other lawsuits. The District Court should be required to review the case based in the Court of Appeals decision.

CONCLUSION

For the foregoing reason, the Petitioner respectfully submits that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDICES



APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 87-1240

ANTHONY J. SCHERER, JR.,

Plaintiff-Appellant,

v.

DAVID J. BALKEMA, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 79 C 3686—Prentice H. Marshall, Judge.

ARGUED OCTOBER 29, 1987—DECIDED FEBRUARY 9, 1988

Before BAUER, *Chief Judge*, CUDAHY and POSNER, *Circuit Judges*.

BAUER, *Chief Judge*. Anthony J. Scherer, Jr. was a federally licensed firearms dealer in the 1960s and early 1970s. The subject of government surveillance for a number of those years, he was convicted in 1974 for violating federal laws and regulations governing firearms dealers. *See United States v. Scherer*, 523 F.2d 371 (7th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976). During and since that period, Scherer persistently challenged in federal court his treatment by government officials, particularly by agents of the United States Department of the Treasury's

Bureau of Alcohol, Tobacco, and Firearms (BATF).¹ This action is Scherer's latest challenge. Scherer's amended complaint² alleges that forty-nine federal agents, most from the BATF, conspired from 1963 to 1979 to deprive him of his constitutional rights by engaging in a pattern of attempted entrapment, illegal searches and seizures, perjury, the destruction of evidence, and the withholding of documents. Scherer seeks compensatory and punitive damages under 42 U.S.C. §§ 1983, 1985(3), and 1986, and the second, fourth, fifth, eighth, ninth, and fourteenth amendments.

The district court, after reviewing various defendants' motions to strike or dismiss Scherer's allegations, along with Scherer's responses, dismissed the entire suit. The court dismissed Scherer's claims under 42 U.S.C. §§ 1983, 1985(3), and 1986, and 28 U.S.C. § 1343 because he failed to allege sufficiently any state action or racial or class discrimination. The court also dismissed Scherer's *Bivens* claims.³ It first held that, because damages in a civil con-

¹ See, e.g., *Scherer v. Brennan*, 266 F. Supp. 750 (N.D. Ill. 1966); *Scherer v. Brennan*, 379 F.2d 609 (7th Cir. 1967); *Scherer v. Morrow*, 401 F.2d 204 (7th Cir. 1968), cert. denied, 399 U.S. 868 (1969); *Scherer v. Kelley*, 584 F.2d 170 (7th Cir. 1978); *United States v. Scherer*, 523 F.2d 371 (7th Cir. 1975), cert. denied, 424 U.S. 911 (1976); *United States v. Scherer*, 673 F.2d 176 (7th Cir.), cert. denied, 457 U.S. 1120 (1982). This list is by no means exhaustive.

² Scherer filed his original complaint on September 9, 1979. No action was taken, however, pending resolution of another matter before the same district court judge. Scherer filed his amended complaint on November 19, 1985.

³ In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court permitted a damages action against federal defendants alleged to have violated the fourth amendment. In *Davis v. Passman*, 442 U.S. 228 (1979), the Court extended *Bivens* to fifth amendment due process claims. Although the Court has yet to decide whether *Bivens* applies to all the constitutional provisions upon which Scherer relied in his complaint, (cf. *Gibson v. United States*, 781 F.2d 1334, 1341-42 (9th Cir. 1985) (extending *Bivens* to first amend-

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spiracy action run separately from each overt act (and not from the mere continuance of the conspiracy) and that each overt act therefore triggers its own limitations period, the applicable statute of limitations barred most of Scherer's allegations.⁴ It next held that Scherer failed to allege sufficiently that the defendants fraudulently concealed information from him, an allegation which, if successful, would have tolled the statute of limitations. Finally, the court held that Scherer's remaining timely allegations failed to allege sufficiently that the defendants conspired to deprive him of his constitutional rights.

Scherer contends on appeal that the district court erred in dismissing most of his *Bivens* allegations as time-barred, and in holding that his remaining allegations failed to allege sufficiently a conspiracy on the part of defendants. We reject the former argument, accept the latter, yet affirm the dismissal of his timely allegations on other grounds.

I.

A.

Scherer's first argument is that a civil conspiracy action accrues in its entirety upon the occurrence of the last act in furtherance of the conspiracy. He claims that because he alleged some overt acts in furtherance of defendants' conspiracy within the limitations period, he can recover damages for alleged constitutional violations occurring before this period, even though recovery would

³ *continued*

ment)), because Scherer alleged mostly fourth and fifth amendment violations, the district court construed the amended complaint as alleging a valid *Bivens* action for purposes of the defendants' motions to dismiss.

⁴ The district court, after an extensive analysis, applied a five-year statute of limitations to Scherer's allegations. Scherer does not dispute that application on appeal.

be time-barred if those violations were sued upon individually.

The Ninth Circuit recently rejected this argument in *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986), *cert. denied*, ____ U.S. ___, 107 S. Ct. 928 (1987), a civil conspiracy action similar to this one. Applying what it called the "last overt act doctrine" to the plaintiff's "far-rago of allegations against numerous federal and local officials," *id.* at 1340, the court in *Gibson* held that

"[i]njury and damage in a civil conspiracy action flow from the overt acts, not from 'the mere continuance of a conspiracy.'" *Kadar Corp. v. Milbury*, 549 F.2d 230, 234 (1st Cir. 1977) (quoting *Hoffman v. Halden*, 268 F.2d 280, 303 (9th Cir. 1959)). Consequently, the cause of action runs separately from each overt act that is alleged to cause damage to the plaintiff, *Lawrence v. Acree*, 665 F.2d 1319, 1324 (D.C. Cir. 1981) (per curiam), and "[s]eparate conspiracies may not be characterized as a single grand conspiracy for procedural advantage." *Fitzgerald v. Seamans*, 553 F.2d 220, 230 (D.C. Cir. 1977). Accordingly, plaintiffs may recover only for the overt acts . . . that they specifically alleged to have occurred within the . . . limitations period. *Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 71 (9th Cir.), *cert. denied*, 444 U.S. 900 (1979).

Id. Other circuits, as the district court below noted, also apply this rule in civil conspiracy actions, *see e.g.*, *Lawrence*, 665 F.2d at 1324 (D.C. Cir. 1981) (per curiam); *Singleton v. City of New York*, 632 F.2d 185, 192-93 (2d Cir. 1980), *cert. denied*, 450 U.S. 920 (1981); *Kadar Corp.*, 549 F.2d at 234-35 (1st Cir. 1977); *Mizell v. North Broward Hospital Dist.*, 427 F.2d 468, 475 (5th Cir. 1970), and district courts in still other circuits have done the same, *see McKelvey v. Marriot Corp.*, 488 F. Supp. 345, 346 (D. Md. 1980); *Safeguard Mutual Insurance Co. v. Miller*, 477 F. Supp. 299, 308 (E.D. Pa. 1979); *see also Creative Environments, Inc. v. Estabrook*, 41 F. Supp. 547, 554

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(D. Mass. 1980), *aff'd.*, 680 F.2d 822 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982).

Unfortunately, some courts have used the phrase "last overt act" in different contexts and Scherer, as he did in the district court, claims these cases support his interpretation of the "last overt act" doctrine. For example, Scherer professes to find an ally in *Baker v. F & F Investments*, 420 F.2d 1191 (7th Cir. 1970), a civil conspiracy action in which we stated that "the limitations periods commence to run from the last overt act of the conspiracy, permitting plaintiffs to recover 'for damages suffered within the damage period as a result of an overt act repetitious of the unlawful pre-[limitation] period acts occurring in the damage period.' " *Id.* at 1200 (quoting *Hazeltine Research, Inc. v. Zenith Radio Corp.*, 418 F.2d 21, 25 (7th Cir. 1969)). In *Baker*, however, we focused on a series of continuing contractual relationships between the plaintiffs and defendants. Because of the "continuing nature" of the installment purchase contracts involved there, we held that the termination, not the execution, of the contracts was the last overt act for limitations purposes. We still applied the limitations period to each individual contract. See *id.* *Baker*, therefore, does not support Scherer's position, nor, as the district court concluded, do any of the other cases he offers.⁵

⁵ For example, in *Hazeltine*, the case we quoted in the *Baker* passage upon which Scherer relies, we held that where "repeated and measurable invasion of a plaintiff's rights occurs both outside the statutory period and also within it, the fact that some of the injury and damage occurred outside the statutory period does not affect the plaintiff's right to recover for the separate invasion of its rights which occurred within the period." 418 F.2d at 25 (quoting *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* 377 F.2d 776 (3d Cir. 1967)). How this supports Scherer is a mystery to us. Similarly, in *Fiswick v. United States*, 329 U.S. 211 (1946), the Supreme Court held that the "last overt act" triggered the statute of limitations in a *criminal conspiracy* action that involved no other charges of substantive crimes. *Fiswick*, therefore

(Footnote continued on following page)

A rule allowing plaintiffs in civil conspiracy actions to recover only for overt acts alleged to have occurred within the applicable limitations period makes sense. The function of statutes of limitations is "to pull the blanket of peace over acts and events which have themselves already slept for the statutory period, thus barring proof of wrongs imbedded in time-passed events." *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 72 (9th Cir. 1979) (quoting *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117, 127 (5th Cir. 1975), cert. denied, 423 U.S. 1054 (1976)). Thus, characterizing the defendants' separate wrongful acts as having been committed in furtherance of a "continuing" conspiracy should not postpone accrual of damage claims based on individual wrongful acts.⁶ As the Second Circuit has noted,

⁵ *continued*

does not apply to a civil conspiracy action to recover damages. In *Newman v. Wanland*, 651 F. Supp. 20 (N.D. Ill. 1986), the court cited *Baker* in holding that "the limitations period begins to run from the last overt act of the conspiracy" in a RICO conspiracy claim. *Id.* at 22. The court then found that the complaints alleged overt acts within the two-year statute of limitations applicable to the claim. It is unclear in *Newman*, however, whether all of the alleged overt acts occurred within the two-year limitations period and, therefore, whether the district court concluded that acts alleged to have occurred outside the limitations period were nonetheless not time-barred because the complaints asserted a "continuing conspiracy." It is, therefore, no help to Scherer. *Buford v. Trenayne*, 747 F.2d 445 (8th Cir. 1984), also is unpersuasive. The Eighth Circuit in that case determined which Missouri statute of limitations applied to a civil conspiracy action under section 1983 and found that even the last overt act alleged by the plaintiff occurred outside the limitations period. Although the Eighth Circuit cited *Fiswick, supra*, in stating that "the statute of limitations begins to run from the occurrence of the last overt act resulting in damage to the plaintiff," *id.* at 448, the court did not consider the issue we face here, and we do not read it as supporting Scherer's argument. Finally, *United States v. President*, 591 F. Supp. 1313 (N.D. Ill. 1984), is outdated. The authority upon which it relies has been overruled by the *Gibson* case.

⁶ Unless, as with the installment contracts in *Baker*, the wrongful acts themselves are of a continuing nature, which Scherer cannot and does not claim here.

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the crucial time for accrual purposes is when the plaintiff becomes aware that he is suffering from a wrong for which damages may be recovered in a civil action. To permit him to wait and toll the running of the statute simply by asserting that a series of separate wrongs were committed pursuant to a conspiracy would be to enable him to defeat the purpose of the time bar, which is to preclude the resuscitation of stale claims.

Singleton, 632 F.2d at 192.⁷ We agree.

B.

Scherer next argues that the statute of limitations was tolled with respect to his otherwise time-barred allegations because the defendants fraudulently concealed information from him and thereby prevented him from realizing he was injured. He claims that until he obtained documents under the Freedom of Information Act (FOIA), he did not know that certain letters mailed to him were from BATF agents, that undercover BATF agents offered to buy guns from him in an illegal manner, and that documents were withheld from him.

The district court found that Scherer's amended complaint failed to allege adequately the necessary elements of a fraudulent concealment claim,⁸ and we agree with its analysis and conclusion that

⁷ Indeed, the logical extreme of Scherer's argument is that "a conspiracy action could not be maintained—since no cause of action would have accrued—until it could be told with certainty that the final overt act in furtherance of the conspiracy had been committed." *Kadar*, 549 F.2d at 235.

⁸ To invoke the fraudulent concealment doctrine, a plaintiff must: (1) "plead with particularity the circumstances surrounding the concealment"; (2) "'state facts showing his due diligence in trying to uncover the facts'"; and (3) "allege facts showing affirmative misconduct on the part of defendants. *Gibson*, 781 F.2d at 1345 (quoting *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978)); see also *Baker*, 420 F.2d at 1100.

[Scherer's] assertions . . . are not specific enough to merit relief under the fraudulent concealment doctrine. Plaintiff fails to allege any affirmative misconduct by defendants. Nor does his general statement that he still seeks information, without particular facts showing, for instance, that he has exhausted his remedies under the Freedom of Information Act, demonstrate concealment. Furthermore, plaintiff admits that he knew "certain of the acts" of defendants before the limitations period had expired, Plf. Responses at 8; presumably, he could have litigated them then. The four later-discovered incidents, since they merely amplify the dozens of other allegations in the amended complaint, would not have changed the litigation. Therefore, concluding that plaintiff could have sued on each claim while it was timely, we shall not consider any acts that occurred beyond the limitations period.

We find no error in the district court's dismissal of Scherer's pre-September 9, 1974 allegations.

II.

Scherer also argues that the district court erred when it found that his remaining timely *Bivens* claims (those based on acts alleged to have occurred within the limitations period) failed to allege sufficiently a conspiracy on the part of the defendants. The district court found that

[Scherer's] timely claims include one-paragraph charges of perjury; interference with and searching of a defense witness; destruction of evidence and property; and refusal to disclose materials sought under the Freedom of Information Act. Amended Complaint, ¶¶ 152, 155-57, 160-69. At least some of these acts might violate plaintiff's constitutional rights; thus plaintiff may have met the second element of a *prima facie* case [of conspiracy]. Nowhere, however, does he allege any agreement, either among the defendants or even among others named as per-

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petrators but not as defendants. Nor could a jury infer such an agreement from plaintiff's mere identification of certain individuals with isolated acts. Thus, we conclude that these allegations fail to allege a civil conspiracy, and we dismiss the amended complaint.

Scherer insists that his amended complaint should be read in its entirety, and that it "shows a continuing agreement and pattern of acts between agents of the federal government to unlawfully interfere with Plaintiff's mail, and attempts to get him to commit unlawful acts." He argues that a jury could infer a conspiracy among defendants from his numerous allegations dating back to the early 1960s.

In *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980), *reh'g denied*, 448 U.S. 913 (1980), we explained that a civil conspiracy

is a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage.

Id. at 620-21. Thus, to establish a *prima facie* case of a civil conspiracy, a plaintiff must show (1) an express or implied agreement among defendants to deprive plaintiff of his or her constitutional rights and (2) actual deprivations of those rights in the form of overt acts in furtherance of the agreement. As noted, because the plaintiff's damages in a civil conspiracy flow from the overt acts, the statute of limitations analysis applies to the latter element, barring recovery for acts alleged to have occurred outside the limitations period.

It does not follow, however, that the statute of limitations excludes those same allegations from the determination of whether an agreement existed. To permit the statute of limitations to bar consideration of allegations from which a jury could infer an agreement would prevent re-

covery for damages suffered within the limitations period merely because the defendants formed their agreement too early. Indeed, crafty conspirators could agree to injure and then wait out the statutory limitations period before inflicting the injury to avoid civil liability for their conduct. This is wrong. If a plaintiff is injured within the applicable limitations period by an act committed in furtherance of a civil conspiracy entered into outside that period, he should be able to recover for that injury. See *Hazeltine*, 418 F.2d at 25. Necessarily, he must be able to prove the agreement. In short, the agreement and the overt acts causing damage are separate components of a civil conspiracy. The statute of limitations applies to the latter; the district court erred in applying it to the former.

III.

Nevertheless, dismissal of Scherer's remaining *Bivens* allegations is warranted. The defendants have raised a number of other grounds for dismissal both in the district court and on appeal, none of which Scherer finds worthy of reply. We, however, find them persuasive.⁹

First, some of Scherer's timely claims are precluded by the doctrine of collateral estoppel, which forecloses relitigation of a matter that has been litigated and decided. *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 77, n.1 (1984). In general, collateral estoppel, which may be applied in civil trials to issues previously determined in a criminal conviction, *Otherson v. Department of Justice*, 711 F.2d 267, 271 (D.C. Cir. 1983), precludes relitigation of issues when "(1) the party against whom the doctrine is asserted was a party to the earlier proceeding; (2) the issue was actually litigated and decided on the merits; (3) the resolution of the particular issue was necessary to the result; and (4) the issues are iden-

⁹ We, of course, may rely on these grounds for affirmance, whether or not passed upon by the district court. *City of Milwaukee v. Sarbe*, 546 F.2d 643, 704 (7th Cir. 1976).

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tical." *Kunzelman v. Thompson*, 799 F.2d 1172, 1176 (7th Cir. 1986). The policy underlying the doctrine is that "one fair opportunity to litigate an issue is enough." *Bowen v. United States*, 570 F.2d 1311, 1322 (7th Cir. 1978).

This once-is-enough doctrine applies to some of Scherer's timely allegations. First, Scherer alleges that on or about November, 1975, a Mr. Rivard, who is not a defendant, falsely testified that he (Rivard) had made no written reports of his dealings with Scherer, but that BATF had copies of such reports which were not made available to Scherer at trial. In *United States v. Scherer*, No. 79-1342 (7th Cir.) (Unpublished Order, May 21, 1980), *cert. denied*, 449 U.S. 873 (1980), we addressed this same contention and found that there was "no basis for [Scherer's] allegations of perjury or failure to disclose evidence." Second, Scherer alleges that a statement used as evidence at his trial, identified as Exhibit 30, said to have been made by defendant Jorgenson on October 5, 1972, "was found in May, 1979 to have been made at a different date and the contents of the statements were changed." In *United States v. Scherer*, 673 F.2d 176, 179 (7th Cir.), *cert. denied*, 473 U.S. 1120 (1982), we dealt with the same allegation concerning the very same exhibit and found that it could not support a perjury claim, nor could it prejudice Scherer's ability to conduct his defense. Finally, Scherer alleges that on or about 1976, BATF agents destroyed evidence that would have shown the illegality of a search warrant. Scherer does not identify the alleged destroyed evidence or the relevant search warrant, he merely asserts this conclusion of law based upon his characterization of an unknown object. In any case, Scherer made this same allegation in his complaint filed in 1979. In *United States v. Scherer*, 673 F.2d 176 (7th Cir.), *cert. denied*, 457 U.S. 1120 (1982), we considered, three years later, all of Scherer's illegal search and seizure arguments and rejected them. *Id.* at 178-80, 180-82. In addition, if Scherer is attempting to vitiate the search warrant in his criminal case, we have already held on direct appeal that probable cause existed to support that search warrant. See *Scherer*, 673 F.2d at

181. Each of these allegations thus were fully litigated in prior proceedings in this court involving the same parties and therefore cannot be relitigated under the doctrine of collateral estoppel.

The bulk of Scherer's remaining timely allegations concern his attempts to obtain information from the defendants under FOIA. Scherer, however, does not allege that he exhausted his remedies under FOIA. In the absence of such an allegation, he states no claim upon which relief can be granted. *Hedley v. United States*, 594 F.2d 1043 (5th Cir. 1979). Nor does this allegation identify a violation of a constitutional right. See *Fendler v. U.S. Parole Commissioner*, 774 F.2d 975, 980 (9th Cir. 1985). Scherer's sole remaining timely allegation, that BATF agents in 1976 destroyed property belonging to Scherer, despite a hold on this property, is moot because it is subject to a Hold Harmless Agreement entered into by Scherer as part of his settlement in *United States v. Miscellaneous Firearms*, No. 74 C 877 (N.D. Ill.).

For these reasons, we hold that that dismissal of the entire amended complaint was appropriate because Scherer has failed to state a claim upon which relief can be granted.

The district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

155. On information and belief, UNKNOWN AGENTS on or about November 14, 1975, interfered with and searched a person who was to be a witness for SCHERER at trial.

156. On information and belief, on or about 1976 the BUREAU OF ALCOHOL, TOBACCO and FIREARMS destroyed evidence that would show the illegality of a search warrant.

157. On information and belief on or about 1976, B.A.T.F. Agents destroyed property belonging to SCHERER. This was done despite a U.S. Marshall's hold on this property and on orders of WELCH. Others involved in this action were Agents KLINE, SCOTT, SILVERMAN, RICHARDSON, WESOKY and SHELTON.

158. On information and belief, other officials of the DEPARTMENT OF TREASURY have wrongfully used the nondisclosure sections of the Freedom of Information Act, 5 U.S.C. 552, to deny SCHERER documents which will make this conspiracy more evident.

159. On information and belief, documents which SCHERER was entitled to and eventually received under the Freedom of Information Act were initially denied to him by the DEPARTMENT OF TREASURY resulting in further delay and further expense to SCHERER and were part of the conspiracy.

160. On information and belief, the U.S. SECRET SERVICE, wrote on October 28, 1975, to SCHERER refusing to disclose certain materials sought by SCHERER under the Freedom of Information Act, thereby upholding an administrative decision of GOFF.

161. On information and belief, RANTA withheld documents on or about October 9, 1975, sought by SCHERER under the Freedom of Information Act.

162. On information and belief, LEE withheld documents sought by SCHERER under the Freedom of Information Act on or about April 9, 1976.

163. On information and belief, the BUREAU OF ALCOHOL, TOBACCO and FIREARMS, wrote to SCHERER on March 31, 1976, denying SCHERER material sought under the Freedom of Information Act.

164. On information and belief, on or about May 17, 1976, Interpol withheld documents sought by SCHERER under the Freedom of Information Act.

165. On information and belief, HURLEY for the U.S. CUSTOMS SERVICE wrote to SCHERER on June 15, 1976, denying SCHERER material sought under the Freedom of Information Act.

166. On information and belief, McCONNELL in a letter of September 12, 1975, to SCHERER for the BUREAU OF ALCOHOL, TOBACCO and FIREARMS stated that there were 5,500 pages of documents concerning SCHERER in its files. A lawsuit under the Freedom of Information Act seeking the release of these documents was started in 1976, *Scherer v. Kelly*, No. 76-C 1052 and No. 76-C-1953 (N.D. of Ill., E.D.). The BUREAU OF ALCOHOL, TOBACCO and FIREARMS on or about November 14, 1975, found that there were an additional 130 pages of documents in its files concerning SCHERER. This fact was concealed from SCHERER until May of 1978, and was concealed from the United States District Court for the Northern District of Illinois, Eastern Division and the Seventh Circuit Court of Appeals.

167. On information and belief, TYLER for the FEDERAL BUREAU OF INVESTIGATION wrote to SCHERER on September 27, 1976, and refused to release documents sought under the Freedom of Information Act.

15 a

168. On information and belief, MIRIANA withheld documents sought by SCHERER under the Freedom of Information Act on or about April 15, 1977.

169. On information and belief, a statement used as evidence at SCHERER's trial (Exhibit 30), said to have been made by Jorgensen on October 5, 1972, was found in May, 1979, to have been made at a different date and the contents of the statement were changed. This differing document was in the possession of the government.



APPENDIX C

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604
(ARGUED JANUARY 7, 1980)

May 21, 1980.

Before

Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

**UNITED STATES OF
AMERICA,**

Plaintiff-Appellee,

No. 79-1342 *vs.*

**ANTHONY J. SCHERER,
JR.**

Defendant-Appellant.

Appeal from the United
States District Court
for the Northern
District of Illinois,
Eastern Division.

—
No. 74 CR 99
—

James B. Parsons,
Judge.

ORDER

Defendant-appellant Anthony J. Scherer appeals from the order of the district court denying his petition for a writ of habeas corpus under 28 U.S.C. § 2255, in which he moved the court to vacate the judgment and sentence entered upon his conviction for violations of the Gun Control Act of 1968, 18 U.S.C. § 922(m). We affirm.

I

On January 31, 1974, a federal grand jury returned an eleven count indictment charging that Scherer, as a dealer in firearms, knowingly and unlawfully failed to record the disposition of certain firearms in violation of Title 18, United States Code, Section 922(m) (counts one through nine and eleven). The indictment further charged that Scherer knowingly and unlawfully received and possessed a certain firearm not registered to him in violation of Title 26, United States Code, Section 5861(d) (count ten).

On November 4, 1974, the defendant waived his right to trial by jury and proceeded to an eleven day bench trial before Chief Judge Parsons. On November 19, 1974, the trial court entered a finding of guilty on counts one through nine and not guilty on count eleven (count ten was dismissed previously). On December 13, 1974, Scherer was sentenced to a concurrent term of two years in custody on each of counts one through nine. This Court affirmed the conviction on November 19, 1975. *United States v. Scherer*, 523 F.2d 371 (7th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976).

On March 12, 1976, the trial court reviewed the defendant's motion for a reduction of sentence and reduced the sentence to seven months in custody, to be followed by three years' probation. On May 26, 1976, the court granted the defendant's second motion for reduction of sentence and reduced the period of incarceration to time served.

On July 7, 1978, the defendant filed the instant petition, alleging three ground for federal habeas relief: (1) that his Sixth Amendment right to adequate representation was violated by an alleged conflict of interest on the part of his retained counsel; (2) that his Fifth Amendment right to due process was violated by the government in knowingly permitting false or perjured testimony by their informant witness and by wilfully refusing to disclose

evidence favorable to the defendant; and (3) that the government employed illegal electronic surveillance against him in violation of his Fourth Amendment rights. On December 18, 1978, the district court found each of these grounds to be without merit and accordingly denied the petition. The defendant now appeals from that adverse decision to this Court.

II

In his first argument on appeal, the defendant asserts that he was denied adequate assistance of counsel because his privately retained counsel also served as counsel for a witness called by the defense at a pretrial hearing on a motion to suppress physical evidence. Citing that portion of the record where, during cross-examination of the witness by the government, Scherer's counsel instructed the witness to assert his Fifth Amendment privilege, Scherer contends that his counsel was "attempting to serve two masters," that the conflict appeared clearly on the record, and that the trial court declined to invoke remedial measures when the situation arose. Scherer accordingly argues that he established a showing of inadequate assistance of counsel sufficient to require that his conviction be vacated. We disagree.

As a threshold matter, it is axiomatic that a motion attacking a judgment and sentence is not cognizable under Section 2255 where used as a substitute for direct appeal, and even where, as here, a constitutional issue is raised, the defendant's deliberate circumvention of direct review precludes consideration of his claim of inadequate assistance of counsel. *Davis v. United States*, 411 U.S. 233, 240 (1973). Although Scherer's arguments in support of this claim are based entirely upon facts set forth in the trial court record, he did not present these arguments either in the trial court or in the direct appeal of his conviction to this Court. See *United States v. Scherer*, 523 F.2d 371 (7th Cir. 1975).

Moreover, the defendant's reliance on *Holloway v. Arkansas*, 435 U.S. 475 (1978) is misplaced. In *Holloway*, the Supreme Court held that the trial judge's failure to appoint separate counsel for the co-defendants or to take adequate measures to ascertain whether the risk of a conflict of interest was too remote to warrant separate counsel constituted a violation of the Sixth Amendment guarantee of assistance of counsel, where the attorney requested appointment of separate counsel based upon his representations regarding a conflict of interest in jointly representing co-defendants. *Id.* at 484. The Supreme Court also held in *Holloway* that joint representation of co-defendants or hostile witnesses by a single attorney, absent a specific showing of a conflict of interest is not *per se* violative of the constitutional guarantee of effective assistance of counsel. *Id.* at 482. However, the considerations found controlling in *Holloway* are not present in the case at bar. Scherer's counsel represented Matthew Smytkowski, a co-defendant with Scherer in another case. Thus, Smytkowski was neither a co-defendant in the present case nor a hostile party or witness. He was called by the defense for the limited purpose of testifying that the government informant was aware that certain defense exhibits were toy replicas and not genuine weapons. During cross-examination of Smytkowski by the government, Scherer's counsel foreclosed a line of government cross-examination by advising Smytkowski, as his attorney, to assert his Fifth Amendment privilege.

Nor has the defendant met his burden of alleging and showing specific, actual prejudice and conflict of interest. This burden is particularly heavy since the record shows that he was aware of counsel's dual representation before, during and long after the trial. *See, e.g., United States v. Di Carlo*, 575 F.2d 952, 957 (1st Cir. 1978). Furthermore, even the fact that a defense attorney may be unable to pursue one line of inquiry does not render the defendant's representation inadequate. *United States v. Jeffers*, 520

F.2d 1256, 1266 (7th Cir. 1975). The mere possibility that some item of favorable evidence was undisclosed because of the dual representation of defense counsel is insufficient to require that a conviction be vacated on grounds of conflict of interest. See, e.g., *United States v. Corr*, 434 F. Supp. 408, 414 (S.D. N.Y. 1977). Where, as here, the defendant does not even allege such a possibility and the line of inquiry that was precluded was the government's cross-examination, the absence of any actual prejudice or conflict of interest is manifest on the face of the record.

Finally, we find the defendant's further assertion that the trial court failed to take appropriate action when defense counsel's dual representation became known to be patently meritless. The cited portions of the transcript showed only the fact of dual representation without any evidence of actual prejudice or conflict of interest. Neither the decisions of the Supreme Court nor this Court place any affirmative duty on the trial judge to terminate dual representation in the absence of any indication of actual prejudice and conflict of interest and without any request from a defendant or defense counsel to do so. *Holloway v. Arkansas*, 435 U.S. 475, 483-84 (1980); *United States v. Gaines*, 529 F.2d 1038, 1043 (7th Cir. 1976). We therefore conclude that the defendant has failed to establish a violation of his Sixth Amendment right to assistance of counsel.

III

The defendant next contends that his Fifth Amendment right to due process was violated in that the government knowingly allowed either false or perjured testimony by its informant-witness, George J. Rivard, to be introduced at trial and that it failed to disclose evidence favorable to the defendant prior to trial. In support of this contention Scherer cited Rivard's trial testimony that he did make a written record of his dealings with the defendant and then cites a two-page hand-written document signed by the informant which Scherer asserts was purportedly

prepared by the informant and which was never provided to the defendant at trial. We find this contention devoid of merit.

Rivard testified at trial that after each meeting with the defendant, he would report to ATF agents who would record in handwritten form what he had told them concerning his contacts with the defendant. These statements to the agents were compiled in a seven-page typewritten document which was tendered to Scherer's counsel prior to cross-examination and was marked as Defense Exhibit A-1. It is apparent from and examination of that exhibit that it recorded the information contained in the handwritten document which Scherer now contends he never received. It is also apparent from the testimony at trial and from the face of the two-page document that it was handwritten by ATF agents to record what the informant had told them and that it was merely signed by the informant. Accordingly, there is no basis for the defendant's allegations of perjury or failure to disclose evidence.

IV

In his petition for federal habeas corpus relief, the defendant alleged that his Fourth Amendment rights had been violated by the government's use of illegal electronic surveillance against him. Scherer requested that the government be required to respond by affidavit whether such surveillance had been employed and further requested a hearing on the legitimacy of that surveillance. This allegation is apparently abandoned by the defendant on appeal from the denial of his petition, although we observe that the government did file an affidavit that there had been no electronic surveillance of the defendant or any premises known to be owned, leased or licensed by him. However, the defendant now contends that he was deprived of his Fourth Amendment rights when the proceeds of a warrantless search were used to obtain his conviction. As this issue was not presented for review by the district court in

the defendant's Section 2255 petition, we decline to address it on appeal. *Holmes v. United States*, 323 F.2d 430 (7th Cir. 1963).

For the foregoing reasons, the judgment appealed from is affirmed and the Clerk of this Court is directed to enter judgment accordingly.

AFFIRMED.